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No. ___-____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1995

CITY OF PORTLAND,

Petitioner,

vs.

NORTHWEST ENVIRONMENTAL ADVOCATES, a Non-Profit Oregon Corporation, and NINA BELL,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief of 65 California Cities and Towns, the Santa Clara Valley Nonpoint Source Pollution Control Program, 3 California Sanitation Agencies, and the California Association of Sanitation Agencies as *Amici Curiae* in Support of Petitioner City of Portland

Filed with the Written Consent of Parties

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15 pp

LIST OF *AMICI CURIAE*

- The Santa Clara Valley Nonpoint Source Pollution Control Program

- The California Association of Sanitation Agencies

- 65 California Cities and Towns:

Apple Valley
Bear Lake
Burlingame
Camarillo
Carlsbad
Cathedral City
Chico
Chula Vista
Clearlake
Cloverdale
Coronado
Cotati
Corte Madera
Cupertino
Daly City
Dana Point
Del Mar
East Palo Alto
Eureka
Encinitas
Firebaugh
Fortuna
Foster City
Glendale
Healdsburg
Indio
Jackson
Lafayette
Lemoore
Los Altos
Menlo Park
Milpitas
Monterey
Moreno Valley
Novato
Oceanside
Orinda
Palm Desert
Palo Alto
Parlier
Piedmont
Pittsburg
Portola Valley
Redlands
Reedley
San Bruno
San Buenaventura
San Jose
San Juan Bautista
San Leandro
San Luis Obispo
San Pablo
Saratoga
Sausalito
Solana Beach
Soledad
Sonoma
South San Francisco
Sunnyvale
Sutter Creek
Tracy
Trinidad
Vacaville
Waterford
Yreka

- 3 California Sanitation Districts:

Sanitation District of Orange County
Oro Loma Sanitary District
Union Sanitary District

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INTRODUCTION AND SUMMARY OF ARGUMENT

Judge O'Scannlain, joined by three other Ninth Circuit judges, did not exaggerate when he stated that the panel opinion in this case "significantly reshaped federal environmental law," "upset the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law," and will be "astronomically costly to the municipalities affected." *Northwest Envtl. Advocates v. City of Portland*, 74 F.3d 945, 946 (9th Cir. 1996) (O'Scannlain, J., dissenting from order rejecting suggestion for rehearing *en banc*).

Amici curiae herein are such municipalities and other local public agencies within the State of California which would face the astronomical costs referenced by Judge O'Scannlain, should this Court not grant the Petition for Writ of *Certiorari* filed by the City of Portland in this case on April 23, 1996. The State of California has strict environmental laws governing water quality which go beyond the scope of the federal Clean Water Act, but which do not authorize citizen suits. The panel opinion, in many cases, would provide federal court jurisdiction for citizens to sue to enforce California's strict standards and requirements in the guise of a Clean Water Act lawsuit, circumventing the administrative and judicial remedies California makes otherwise available. This holding directly conflicts with a prior decision by the Second Circuit and the plain language of the applicable provisions of the Clean Water Act, all of which were overlooked by the panel majority.

Amici, with the written consent of the parties (see Appendix A), thus submit this brief to highlight the importance of the question of federal law presented and to urge this Court to grant the City of Portland's petition.

INTERESTS OF *AMICI CURIAE*

Amici herein represent the interests of local public agencies within the State of California which either are, or in the near future may be, subject to one or more National Pollutant Discharge Elimination System ("NPDES") permits for the discharge of wastewater and/or stormwater. While *amici* speak based on their experience in California, their concerns are similar to those of municipalities throughout the nation.

Some of the *amici* California cities and towns, and all of the *amici* sanitation agencies, operate their own wastewater treatment plants. Further, all *amici* cities and towns need to operate drainage facilities to collect and channel stormwater flows. Each *amici* either is required to have an NPDES permit for such operations, or, in the case of stormwater flows in some smaller cities and towns, may be required to obtain an NPDES permit in the near future, *see*, 33 U.S.C.A. § 1342(p) (West Supp. 1996). *Amici* California cities and towns have joined this brief at the urging of the Legal Advocacy Committee of the League of California Cities.

The Santa Clara Valley Nonpoint Source Pollution Control Program is comprised of the Santa Clara Valley Water District, the County of Santa Clara, the Cities of Campbell, Cupertino, Los Altos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, and the Towns of Los Altos Hills and Los Gatos. These municipalities have joined together to administer stormwater pollution control programs throughout the Silicon Valley area of California as required by an NPDES stormwater permit issued jointly to the participants by the California Regional Water Quality Control Board, San Francisco Bay Region pursuant to both the Clean Water Act and State law.

The California Association of Sanitation Agencies represents 90 agencies comprising sanitary districts, sanitation districts, municipal utility districts, and other similar agencies within the State of California involved in wastewater treatment. Together, these agencies serve approximately two-thirds of the sewered population of California (approximately 20 million), as well as commercial and industrial dischargers. Wastewater discharges from these agencies are subject to NPDES permits.

ARGUMENT

By a split 2-1 decision, the Ninth Circuit panel in this case held that, even if a municipal NPDES permittee complies with all of the specific effluent limitations, monitoring, reporting, and programmatic requirements of the NPDES permit, the permittee can still be sued in federal court under the Clean Water Act if compliance with those requirements does not successfully attain the state's water quality goals. *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 985-990 (9th Cir. 1995). Under this holding, such a lawsuit may be filed so long as the state issuing the NPDES permit includes (based on *state*, rather than *federal*, law or policy) a blanket, vague prohibition against discharges causing a violation of its water quality standards. In reaching its holding, the panel vacated its prior opinion in this same case reaching the opposite conclusion. *Northwest Envtl. Advocates v. City of Portland*, 11 F.3d 900, 906-911 (9th Cir. 1993).[1]

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[1]The convoluted procedural history of this case, in which the panel rescinded its prior opinion and reversed itself long after it should have lost jurisdiction (and after the entire Ninth Circuit denied rehearing *en banc*), based on a skewed reading of this Court's decision in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, __ U.S. __, 114 S.Ct.

For the reasons set forth below, *amici curiae* herein request that the Supreme Court grant the City of Portland's petition for writ of *certiorari* and review this decision.

I. The plain language of the Clean Water Act does not authorize citizen suits to enforce state-authored NPDES permit provisions which are outside the scope of the Clean Water Act.

The panel majority holds that "[t]he plain language of CWA § 505 [33 U.S.C. § 1365] authorizes citizens to enforce all permit conditions." 56 F.3d at 986. This directly conflicts with a prior Second Circuit holding that state-imposed NPDES permit requirements "which mandate a greater scope of coverage than that required by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365." *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2nd Cir. 1993).

The "plain language" of the citizen suit provision, in fact, only authorizes citizen enforcement of "a permit or condition thereof issued under section 1342 of this title, *which is in effect under this chapter.*" 33 U.S.C.A. § 1365 (a)(1)(ii)(A), (f)(6) (West 1986 & Supp. 1996) (emphasis added).[2] While states, pursuant to their police power, may include their own requirements in an NPDES permit (such as requirements concerning a general duty to comply with state water quality standards), in addition to the Clean Water Act's requirements,

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1900 (1994), is set forth in the City of Portland's petition, pages 6 and 7 and 21 through 23.

[2]The majority opinion omits the critical language italicized above from its discussion of the "plain language." 56 F.3d at 986.

such additional requirements should not be enforceable in federal court via citizen suit. Under EPA's regulations, "[i]f an approved State [NPDES] program has greater scope of coverage than required by Federal law *the additional coverage is not part of the Federally approved program*," 40 C.F.R. § 123.1(i)(2) (1995) (emphasis added), and thus is not "in effect under this chapter" as that term is used in section 1365(f)(6). The new majority opinion overlooks these regulations and the prior holding of the Second Circuit.

II. Interpreting the Clean Water Act to authorize citizen suits to enforce compliance with state water quality standards imposes a great hardship on California municipalities and other NPDES permittees.

The achievement of state water quality standards is an ambitious and often elusive goal. As recognized in the panel's original opinion, the quality of receiving water often depends upon factors well beyond an individual permittee's control, including natural conditions, the weather, and third parties' intentional and unintentional discharges. 11 F.3d at 910. For this reason, it is fundamental that state water quality standards must be translated into specific NPDES permit requirements, which are the federally enforceable obligations imposed under the Clean Water Act.[3]

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[3]*See*, *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S.Ct. at 1911 [explaining that the "open-ended criteria" in a state's water quality standards "must be translated into specific limitations for individual projects"]; *American Paper Inst. v. EPA*, 996 F.2d 346, 349-353 (D.C. Cir. 1993) [upholding EPA rule requiring the translation of narrative water quality standards into specific NPDES effluent limitations]; *Oregon Natural*

In California, NPDES permits take the form of "waste discharge requirements" issued by one of the Regional Water Quality Control Boards ("Regional Boards") pursuant to section 13263 of the California Water Code. The Regional Boards have the authority to include in such waste discharge requirements (and, consequently, in NPDES permits) regulations relating to activities not covered by the Clean Water Act, such as nonpoint sources of pollution and groundwater pollution. *See*, 2 K. Manaster & D. Selmi, *California Environmental Law and Land Use Practice*, § 31.07 (rev. 1996) [comparing California's water quality law to the federal Clean Water Act].

Although broader than federal law, California water quality law does not authorize citizen suits to enforce its stricter requirements. Rather, California law provides an extensive administrative enforcement process, which must be followed before seeking judicial review in California state courts. *See*, Cal. Water Code §§ 13263(e), 13320, 13323-13325, 13330 (West 1992 & Supp. 1996). The Ninth Circuit's opinion in this case, however, opens the federal courtroom door to litigants who would seek to circumvent this process by going straight to federal court to enforce state regulations.

The new majority agrees that water quality standards are not directly enforceable via citizen suit if they are not included in an NPDES permit, but holds that citizens can sue to enforce them if they *are* included in the permit. 56 F.3d at 989, n. 11. The enforceability of water quality standards in federal court should not turn on this distinction. A state may

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Resources Council v. United States Forest Service, 834 F.2d 842, 850 (9th Cir. 1987) ["[I]t is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards."].

choose to include in an NPDES permit general language requiring maintenance of water quality standards to preserve *its own* inherent police power authority to impose additional pollution control or monitoring requirements on a permittee located in an area of water quality impairment.[4] Such a decision need not serve as a license for flooding the federal courts with citizens' suits against municipalities that are otherwise meeting all of the specific permit requirements mandated by the Clean Water Act.

The problem of allowing citizens' groups to bring actions in federal court concerning violation of state water quality standards is particularly acute for municipal operators of stormdrain facilities. The Clean Water Act requires NPDES permits for stormwater discharges, which contain specific federally enforceable requirements to implement measures to minimize pollutants in runoff. 33 U.S.C.A. § 1342(p)(3)(B) (West Supp. 1996). Yet, no matter how many times streets are cleaned and storm drains inspected, municipalities have no control over the weather and only limited control over the pollutants conveyed in stormwater runoff, or over what a private person may illicitly dump into a storm inlet. However, under the new majority's holding, a city may nonetheless be exposed to costly litigation in federal court and Clean Water Act-authorized penalties of up to $25,000 per occurrence

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[4]*See, EPA v. California*, 426 U.S. 200, 204-205 (1976) [explaining that, under the Clean Water Act, "a discharger's performance is now measured against strict technology-based effluent limitations--specified levels of treatment--to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform," with the standards serving only "as a supplementary basis" authorizing states to impose any "further regulat[ions]" necessary to meet the standards].

anytime a discharge from a stormdrain causes water quality standards to be exceeded.

The new majority's holding that all NPDES permit conditions are enforceable via citizen suit places an undue burden on *amici* herein, *as NPDES permits issued to municipalities within California (including permits for stormwater discharges) often include State-imposed language requiring that discharges should not cause water quality violations.* Many of the *amici* have NPDES permits containing such language.

In sum, so long as an NPDES permittee complies with the specific federally-mandated requirements of its permit, it should not be subject to federal citizens' suits under the Clean Water Act.

CONCLUSION

For the reasons set for above, *amici curiae* herein urge this Court to grant the City of Portland's petition for writ of *certiorari*.

Respectfully submitted,

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May __, 1996

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Consent of Parties to the Filing of Amicus Brief

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Appendix A

The Parties to this action hereby consent to the filing of a joint amicus brief of up to 10 pages in support of Petitioner City of Portland's Petition for Writ of *Certiorari* From the United States Court of Appeals for the Ninth Circuit by approximately 75 California cities, towns, and other local public agencies, by the Santa Clara Valley Nonpoint Source Pollution Control Program, and by the California Association of Sanitation Agencies.

Dated: 4-15-96

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